

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of

2016 Biennial Review of Telecommunications
Regulations

)
)
)
)
)
)
)

WC Docket No. 16-132

REPLY COMMENTS



The American Cable Association (“ACA”) hereby submits reply comments in response to the Public Notice¹ of the Federal Communications Commission (“Commission”) seeking public comment in its 2016 Biennial Review of Telecommunications Regulations.² ACA believes the Biennial Review process mandated by the Communications Act of 1934, as amended,³ provides a valuable opportunity for the Commission to review existing regulations that apply to the operations or activities of any provider of telecommunications service and either eliminate

¹ Public Notice, “Commission Seeks Public Comment in 2016 Biennial Review of Telecommunications Regulations,” CG Docket No. 16-124, EB Docket No. 16-120, IB Docket No. 16-131, ET Docket No. 16-127, PS Docket No. 16-128, WT Docket No. 16-138, WC Docket No. 16-132, FCC 16-149 (rel. Nov. 3, 2016) (“Biennial Review Public Notice”).

² ACA limits its reply comments to regulations for which the Commission sought comment in the Biennial Review Public Notice. However, ACA submits that a number of other regulations, including many overseen by the Media Bureau, are ripe for review by the Commission in light of the substantial burdens that they place on smaller providers and changes in the regulatory and market landscape that have occurred over time.

³ 47 U.S.C. § 161.

regulations that are not in the public interest or modify regulations to ensure they serve the public interest.⁴ In these comments, ACA first discusses regulations affecting providers of telecommunications services that it proposed to be eliminated or modified. It then responds to initial comments of other parties.

I. ACA PROPOSALS TO ELIMINATE OR MODIFY REGULATIONS

ACA submits the following regulations affecting providers of telecommunications services should be eliminated or modified:

A. Universal Service Fund Contributions (Part 54)

Modify the *De Minimis* Exemption by Increasing the Threshold (§ 54.708)

In issuing its Notice of Proposed Rulemaking on reforming the universal service contribution regime, the Commission stated, “[t]oday’s *de minimis* exemption creates administrative burdens and uncertainty for many qualifying providers and [the Universal Service Administrative Company (“USAC”)].”⁵ ACA agrees. Reforming the *de minimis* exemption is one of the most important modifications the Commission could make to ease the burden on smaller telecommunications providers, enabling them to use their resources more efficiently to invest and enhance competition. ACA proposes the Commission modify the *de minimis* threshold by determining the threshold on the basis of assessable revenues and by increasing the threshold at least to its original *de facto* level of \$200,000 in assessable revenues. By moving to a revenues-basis for the threshold, the Commission would alleviate the burdens on many providers with a *de minimis* contribution obligation because they must file the quarterly Telecommunications Reporting Worksheet and contribute on a quarterly basis. But, simply

⁴ 47 U.S.C. § 161(b) provides that the “Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.”

⁵ See *Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46, ¶ 212 (rel. Apr. 30, 2012) (“2012 FNPRM”).

moving to a revenues-basis solves only one of the problems facing smaller service providers. Because the contribution rate has grown over the past decades, the threshold has been effectively pushed downward, subjecting more filers to the burdens of direct contribution, quarterly 499-Q and traffic study filings, and monthly USAC billing. The Commission can readily correct this problem by establishing a revenue-based threshold at the level of at least \$200,000 of assessable revenues. This higher threshold would reflect the level in the early years of the *de minimis* exception when the contribution rate was approximately five percent.⁶

Revise Downward the VoIP Safe Harbor⁷

The Commission should revise downward the safe harbor for allocating VoIP traffic as interstate from the level of 64.9 percent adopted in 2006⁸ because it is a highly inflated proxy for interstate revenues not accurately reflecting today's mix of traffic. In 2012, the Commission indicated that the "average percentage for VoIP traffic studies is 22.1 percent interstate/international, with the median study reporting 14.7 percent interstate/international."⁹ Because the safe harbor is set so high, many providers find it more economical not to use it. Unfortunately, smaller providers are the "few providers" that end-up using the safe harbor because it is costly and administratively burdensome to engage consultants to prepare up to five traffic studies annually and use counsel to file them. As a result, these smaller providers are placed at a competitive disadvantage. It also means that their customers overpay the universal service contribution (and other fees keyed to the Form 499). For these reasons, the

⁶ See ACA Comments, WC Docket No. 06-122, at 6 (July 9, 2012). Reducing the number of contributors also would reduce administrative processing, billing, and audit costs. In addition, because these smaller providers tend to rely on underlying wholesale providers, their contributions would largely be captured.

⁷ There are no codified rules on how to allocate revenues. Instead, the Commission provides guidance in Form 499-A Instructions.

⁸ *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122, et al., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 54 (2006).

⁹ 2012 FNPRM, ¶ 125.

Commission should enable providers to use a reasonable safe harbor rate based on the average reported in the 2012 FNPRM (22.1 percent).

Repeal Unnecessary Traffic Study Requirements

Should a provider seek to use traffic studies to allocate the jurisdictional percentages of its VoIP revenue, it currently needs to submit a traffic study with each quarterly Form 499-Q. From the perspective of a smaller provider, this imposes a significant administrative burden and legal cost. Moreover, it is unnecessary because quarterly filings are simply estimations of projected revenue in the first place and do not establish a contributor's ultimate liability. Moreover, the current system protects against under-reporting. If a provider has under-reported assessable revenues through its Form 499-Qs, USAC calculates an additional true-up payment using a formula that disfavors the provider. Thus, minor inaccuracies in estimated quarterly interstate revenues, especially by smaller providers, are not consequential in terms of funding. The Commission should permit smaller providers to elect to rely on the prior year's traffic study when preparing Form 499-Qs and require only one traffic study filing annually in connection with the Form 499-A.

The Commission also should clarify that it is not necessary to file a "traffic study" when a VoIP provider determines its jurisdictional allocations by measuring 100 percent of its traffic for the reporting period. When all of the traffic is measured, the provider is reporting its "actual" interstate revenue and not a "study" using statistical "sampling techniques" with a "margin of error."¹⁰ Further, there is no benefit when a provider explains the statistical "confidence level" and "margin of error" of a 100 percent sample. ACA thus requests that the Commission amend

¹⁰ 2016 *Telecommunications Reporting Worksheet Instructions (FCC Form 499-A)*, at 41, available at (http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0208/DA-16-138A2.pdf) (explaining that when performing traffic studies, "Sampling techniques must be designed to produce a margin of error of no more than one percent with a confidence level of 95%. If the sampling technique does not employ a completely random sample (e.g., if stratified samples are used), then the respondent must document the sampling technique and explain why it does not result in a biased sample.").

the Form 499-A to permit service providers to avoid any inquiry about their allocation if they certify they have measured 100 percent of the traffic to perform the jurisdictional allocation.

B. Broadband Reporting Form 477 (Part 1)

Modify the Form 477 Filing Requirement to Permit Smaller Providers to File Annually Instead of Semi-Annually (§§ 1.7002, 43.01(d))

In 2013, the Commission assumed responsibility from the National Telecommunications and Information Administration for the collection of broadband deployment data and revised its Form 477 collection.¹¹ This collection is mandatory for all wireline and mobile wireless providers.¹² The Commission uses this data to fulfill its mandate to assess annually the state of broadband availability under the Broadband Data Improvement Act (“BIDA”), update its universal service policies, and meet its public safety obligations. In adopting rules in 2013, the Commission sought to alleviate burdens on filers, but it refused to exempt small providers, concluding the benefits outweigh the burdens.¹³ In adopting this order, the Commission did not address the question of whether by permitting small providers to file annually instead of semi-annually, it could continue to have sufficiently accurate data from small providers while lessening the burdens on small providers. ACA contends that in fact would be the case. At the same time, instituting an annual filing process for smaller providers would not significantly harm the Commission’s need to access accurate data. Over the past several years, the Commission has developed a sound database of deployment data, including deployment trends. Further, the BIDA only requires the Commission to make an annual assessment. For these reasons, even if

¹¹ *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, Report and Order, FCC 13-87 (rel. June 27, 2013) (“Form 477 Order”).

¹² 47 C.F.R. §§ 1.7001, 43.01(d))

¹³ Form 477 Order, ¶ 29

the Commission continues a semi-annual collection process, it should give small providers the opportunity to submit data annually.¹⁴

C. Rural Call Completion (Part 64)

Modify the Definition of “Covered Provider” to Raise the Subscriber Line Threshold so that it Covers Long Distance Voice Providers that Make the Initial Long Distance Call Path Choice for More than 250,000 Domestic Retail Subscriber Lines. (§ 64.2101)

In establishing rules to address concerns about call completion in rural areas, the Commission sought to balance its need to collect complete data with the significant burdens the new data collection and reporting requirements would impose on smaller providers.¹⁵

Accordingly, it limited its definition of Covered Provider to providers that make the initial long distance call path choice for more than 100,000 domestic retail subscriber lines.¹⁶ ACA supported this outcome, providing evidence that the “proposed monitoring and reporting requirements would be onerous for ACA members” and noting that the quality of the data collection would suffer little since the vast number of voice subscriber lines are controlled by mobile wireless operators (about 75 percent) and the top ten multiple system operators controlled more than 95 percent of the lines supplied by cable operators.¹⁷

ACA continues to be concerned about rural call completion problems and supports government efforts to alleviate them. It notes that the U.S. House of Representatives recently passed legislation to address specific issues about actions by intermediate carriers in ensuring

¹⁴ ACA also suggests it is time for the Commission to revisit the Form 477 Data Program to determine whether it can relieve filers of any reporting obligations.

¹⁵ *Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-135, ¶ 27 (Nov. 8, 2013).

¹⁶ *Id.*

¹⁷ See *id.*, n. 85, and Comments of American Cable Association, WC Docket No. 13-39, at 7-10 (May 13, 2013) (“ACA Call Completion Comments”).

the completion of calls in rural areas.¹⁸ However, since the rules became effective, to the best of ACA's knowledge, there have been no complaints about small, and even mid-sized, providers not completing calls. At the same time, ACA members with more than 100,000 subscriber lines find that the burdens of compliance are significant. ACA thus proposes the Commission consider increasing the Covered Provider threshold at least to 250,000 subscriber lines and perhaps more. Such an increase would be consistent with the definition of – and exemption for – small broadband Internet access providers in legislation recently passed in the House of Representatives¹⁹ and approved by the Senate Committee on Commerce, Science, and Transportation.²⁰ Finally, ACA suggests the Commission also consider for Covered Providers with more than the threshold number of lines creating a safe harbor for compliance so long as they require in their access tariff or via contracts with long distance providers that the long distance provider complete calls they originate in compliance with the Commission's rules (§ 64.2101 *et seq.*).²¹

II. ACA RESPONSE TO COMMENTS AND PROPOSALS

Pole Attachments (Part 1, Subpart J)

Reject CenturyLink's Proposal to Permit Incumbent Local Exchange Carriers to Demand Access to Competitive Local Exchange Carriers' Poles, Ducts, Conduits, and Rights-of-Way.

¹⁸ Improving Rural Call Quality and Reliability Act of 2016, H.R. 2566, 114th Cong. (as passed by the House of Representatives, Sept. 21, 2016).

¹⁹ Small Business Broadband Deployment Act, H.R. 4596, 114th Cong. (as passed the House of Representatives, Mar. 16, 2016).

²⁰ Small Business Broadband Deployment Act, S. 2283, 114th Cong. (as reported by S. Comm. on Commerce, Science, and Transportation, Dec. 6, 2016).

²¹ See ACA Call Completion Comments at 10.

In its comments, CenturyLink seeks to reverse the Commission's longstanding interpretation of Section 224 of the Communications Act, as amended,²² that while competitive local exchange carriers ("CLECs") can demand access to incumbent local exchange carriers' ("ILECs") poles, ducts, conduits, and rights-of-way, ILECs cannot demand such access from CLECs.²³ ACA opposes CenturyLink's request. The Commission revisited the issue of ILEC rights under the statute to access the infrastructure of other providers in its *2011 Pole Attachment Order*²⁴ and continued to interpret section 224(f)(1), which provides a right of non-discriminatory access by telecommunications carriers to utility facilities, to exclude ILECs.²⁵ At the same time, the Commission re-interpreted another section of the statute, section 224(b), to give ILECs a limited right of access but decided to "exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers."²⁶ Given that the Commission recently addressed this issue and reaffirmed its statutory interpretation, there is no basis for it to revisit its action and certainly no basis to change course. Further, contrary to CenturyLink's claims, ILECs are not similarly situated to other telecommunications providers; they continue to control access to poles and other infrastructure that are fundamental to the deployment of networks by other providers. ACA further notes that the importance of access to poles and similar facilities was highlighted in

²² 47 U.S.C. § 224.

²³ Comments of CenturyLink, WC Docket No. 16-132 et al., at 12-13 (filed Dec. 5, 2016).

²⁴ *Implementation of Section 224 of the Act, A National Broadband Plan For Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011), *aff'd sub nom., Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (2013) ("2011 Pole Attachment Order").

²⁵ *Id.*, ¶ 202.

²⁶ *Id.*, ¶ 214.

recent proposals by Commissioners Pai and Clyburn.²⁷ For these reasons, the Commission should reject CenturyLink's proposal.

Respectfully submitted,

By: 

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Thomas Cohen
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to American Cable Association

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

January 3, 2017

²⁷ See "Summary of FCC Commissioner Ajit Pai's Digital Empowerment Agenda" (#3, Remove Regulatory Barriers to Broadband Deployment) (Sept. 13, 2016) *available at* <https://www.fcc.gov/document/commissioner-pais-digital-empowerment-agenda>, and Public Notice, Commissioner Clyburn's "#Solutions2020 Call to Action Plan" (#1, Ensuring Affordable Communications) (Dec. 19, 2016) *available at* <https://www.fcc.gov/document/cmmr-clyburn-releases-draft-solutions2020-action-plan>.